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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 1342/2021

In the matter between:

SIKHUSELE MLISA

Plaintiff

and

MINISTER OF POLICE

1st Defendant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Defendant

JUDGMENT

RUSI J

[1] The plaintiff was arrested without a warrant on 04 June 2019 and subsequently detained at the Mt Frere Police Station by a member of the defendant on charges of 'house robbery'. He alleges that his arrest was without any

justification in law. Pursuant to his arrest, he was caused to appear in the Mt Frere Magistrate's Court on 06 June 2019, where he was charged with housebreaking with intent to commit a crime as count one, and robbery as the second count. He remained in custody until 26 June 2019 when he was granted bail of R500.00. The proceedings against him continued until 05 December 2019 when the public prosecutor withdrew the charges against him. He contends that his prosecution was malicious.

[2] On these bases, the plaintiff now sues the first defendant for R200 000.00 as and for damages resulting from his unlawful arrest, R300 000.00 for his unlawful detention for 22 days and R100 000.00 for contumelia. The plaintiff claims R900 000.00 against the second defendant resulting from his malicious prosecution. His claims are resisted by both defendants.

The pleadings

[3] In his amended particulars of claim, the plaintiff alleged, in respect of the claim for unlawful arrest and detention, that he was arrested and detained for 22 days without a warrant. His arrest and detention were wrongful, unlawful and unconstitutional, and an unjustifiable interference with his personal liberty, and they were insulting and injurious, impaired his dignity and self-esteem, and caused him grief, embarrassment and humiliation. The plaintiff further contends that the police failed to conduct a thorough investigation of the case before arresting him. He was detained in unsanitary conditions in a small congested and cold cell. The cell had an unpleasant smell; he was caused to sleep on the cold concrete floor with dirty blankets.

[4] As against the second defendant, the plaintiff alleged that the public prosecutor who was seized with his case in the Mt Frere Magistrates' Court set the

law in motion by preferring false charges against him. The decision to prosecute him was made without reasonable and probable cause, and it was malicious. The prosecutors were aware of the contents of the police docket and the fact that there was no evidence linking him to the commission of the offences he was charged with but nonetheless prosecuted him. He was caused to appear in court on numerous occasions and the prosecution failed on 05 December 2016 when the charges against him were withdrawn.

[5] In resisting the plaintiff's claim for unlawful arrest and detention, the first defendant, who admits the plaintiff's arrest and detention without a warrant, alleged the following facts in its amended plea dated 16 October 2025:

- (a) The plaintiff was arrested and charged with house robbery which took place on 01 June 2019.
- (b) He was clearly identified by the complainant as the suspect. He was arrested and detained 'within the premises of the law specifically section 40 of the Criminal Procedure Act 51 of 1977 (the CPA).'
- (c) He was detained because of his unlawful actions. He was charged with serious offences, and the members of the defendant 'had to act within the premises of the law'.

[6] In denying that the plaintiff was maliciously prosecuted, the second defendant pleaded that the charges against the plaintiff were informed by his 'unmistaken' identification by the complainant as the person who committed the offences. The prosecutors were 'fully convinced' that the plaintiff had a case to answer. The second defendant denied that the prosecution failed and alleged that charges were withdrawn on the basis of the complaint's withdrawal statement.

The issues for determination

[7] Whether there was any justification in law for the arrest and detention of the plaintiff on 04 June 2019, and whether the first defendant is liable for the plaintiff's damages resulting from his continued detention beyond his first appearance in court on 06 June 2019, are the issue for my determination in respect of the plaintiff's claim based on his alleged unlawful arrest and detention.

[8] In regard to the claim for malicious prosecution, this Court must determine whether there was reasonable and probable cause for the prosecution of the plaintiff from 06 June 2019 to 05 December 2019, and whether the prosecution terminated in his favour. The second defendant admitted that it set the law in motion against the plaintiff. Furthermore, this Court must determine whether in prosecuting the plaintiff the prosecutor acted with malice (*animus injuriandi*).

The trial

[9] The trial of the matter proceeded on both the merits and quantum of the plaintiff's claim. Apart from their respective pleadings, the parties relied on the documents discovered between them, which included the contents of the police docket and the record of proceedings against the plaintiff in the Mt Frere Magistrate's Court. The first defendant adduced the evidence of the arresting officer, Captain Maliwa (Capt. Maliwa), and the second defendant called Mr Manase, the public prosecutor who was seized with the plaintiff's case in the Mt Frere Magistrates' Court from 06 June 2019 until the charges were withdrawn on 05 December 2019. The plaintiff was the only witness in support of his case.

The incidence of the onus

[10] The onus rested on the first defendant to justify the plaintiff's arrest and detention. The plaintiff had the onus to prove his claim for malicious prosecution. Resulting from this, the plaintiff accepted the duty to begin leading evidence.

The plaintiff's evidence

[11] The plaintiff testified that he knows Mr Msawenkosi Ngqandana, the complainant in the criminal case against him (the complainant) as his neighbour. In the morning of 01 June 2019, he received a call from his neighbour named Lubabalo who told him that there was a breaking-in and theft at the complainant's home. As it was practice in his locality, local men converged at the scene of the alleged crime to investigate the incident and follow any available leads. On his arrival at the home of the complainant, he found other community members already gathered there. A collective decision was taken to follow the available lead at the time, to the direction of Mabhobho locality in search of the perpetrators and the stolen items. When that search yielded no result, the community members dispersed.

[12] On 04 June 2019, around 22h00, Capt. Maliwa, then holding the rank of a Seargent, arrived at his home in the company of the complainant. They found him in the doorway of his room and without saying anything, they barged into his room and searched it. After the search, Capt. Maliwa took him to the Mt Frere Police Station, and he did not tell him why he was arresting him. There was no justifiable ground for Capt. Maliwa to arrest and detain him.

[13] He made his first appearance in court on 06 June 2019, where he was remanded in custody until 12 June 2019, and nothing was said about bail. On 12 June 2019, his case was postponed to 26 June 2019 on which day his bail application was heard, and he was admitted to bail of R500.00. He continued appearing in court until 05 December 2019 when charges against him were withdrawn.

[14] According to the plaintiff, the prosecutor's decision to enrol the case against him on 06 June 2019 was not founded on any belief that he was guilty of any offence. The evidence that was contained in the docket did not support the allegations that were levelled against him, yet his prosecution was persisted with and this made the prosecution malicious. The plaintiff further contended that the statements of the complainant and his daughter, Ms Y[...] S[...] (Ms S[...]) on which the prosecutor relied in his decision to prosecute him, did not provide convincing proof that he was the person that committed the alleged offences.

The first defendant's evidence

[15] Capt. Maliwa's version of the events leading up to the plaintiff's arrest was that he was assigned to investigate the charge of house robbery that the complainant had laid on 02 June 2019 around 10h00. He interviewed the complainant who made a statement on 02 June 2019 in connection with the matter.

[16] On 04 June 2019 in the evening, he was telephoned by the complainant who informed him that the suspects of the house robbery had since been named by Ms S[...], as "Siphelele Caza" and "Sikhusele Mlisa", and that it was alleged that there was a likelihood that the two suspects would escape. There and then, he proceeded to the complainant's home where he gathered more information about the matter. He did not interview Ms S[...] as she was asleep. He was loath to awaken her since she was a school going child.

[17] The complainant led him to the plaintiff's home where he pointed out the plaintiff as the suspect. He immediately placed the plaintiff under arrest after which he asked him for permission to search his room, which permission was granted. He did not recover any of the stolen items during the search. Despite this, he took the plaintiff to the Mt Frere Police Station where he was charged and detained. In his

words, *“he arrested the plaintiff because he aimed to swiftly secure the arrest and utilize the 48 hours that followed in investigating the matter so as to cover up every loophole and obtain every statement they did not obtain.”*

[18] As his reasons for arresting and detaining the plaintiff, Capt. Maliwa testified that he arrested him because he was pointed out by the complainant as the suspect of the house robbery based on the information that the complainant received from his daughter. He detained the plaintiff due to the seriousness of the offence. Asked if there was any official record of his telephone interaction with the complainant in the evening of 04 June 2019 in which he disclosed the names of the suspects, Capt. Maliwa said that he would have recorded the telephone call in his pocketbook and in the investigation diary. Neither Capt. Maliwa’s pocketbook nor the investigation diary are among the defendant’s discovered document.

[19] What transpired upon arrival at the plaintiff’s home when the complainant pointed the plaintiff as a suspect is detailed in Capt. Maliwa’s statement dated 05 June 2019. Capt. Maliwa obtained the statement of Ms S[...] after on 05 June 2019 at 15h00, a day after the plaintiff’s arrest. He took a further statement from the complainant at 18h00 on that same day.

[20] It was Capt. Maliwa’s evidence further, that, when the plaintiff appeared in court of 06 June 2019, he is the one that had delivered the docket to the prosecutor. At that time, the docket had the statement that the complainant made on 02 June 2019; the statement of Ms S[...] dated 05 June 2019; the complainant’s further statement dated 05 June 2019; his own statement as the arresting officer, dated 05 June 2019; and the notice of constitutional rights given to the plaintiff upon detention on 04 June 2019.

[21] Asked why the plaintiff's release on bail was not considered on his first appearance in court, Capt. Maliwa testified that he is the one who requested the prosecutor to apply for the postponement of the case for a period of seven days. He sought the postponement despite the fact that at that stage he had not found any items of the complainant's stolen property in the plaintiff's possession. According to him, the postponement was so that he may obtain the plaintiff's criminal profile from the local criminal record centre. As a result, on the plaintiff's first appearance in court, proceedings were postponed to 12 June 2019.

[22] Capt. Maliwa further testified that although the plaintiff's profile was made available to him within the seven-day period of postponement, he decided not to submit it to the prosecutor but to wait for the prosecutor's indication of the date when the plaintiff's bail application would be made. He did not communicate his views to the prosecutor regarding the plaintiff's eligibility to be released on bail as he did not consider himself obliged to do so. When the plaintiff's bail application was heard on 26 June 2019, he was not present in court as he had been assigned other duties.

[23] Further according to Capt. Maliwa, on 12 June 2019, the complainant filed a statement in which he withdrew the charges against the plaintiff. On the face of this statement, it was made before Capt. Maliwa at 09h00 on 12 June 2019. This statement was not brought to the attention of the prosecutor on that same day when the plaintiff appeared in court. Capt. Maliwa's explanation was that he learned of the formal withdrawal of the charges when he had left the Mt Frere police station following his promotion.

[24] Regarding whether he was ever instructed by the prosecutor who was seized with the plaintiff's docket to conduct further investigations of the case, Capt.

Maliwa testified that the only instruction he received from the prosecutor was to file the plaintiff's profile.

The second defendant's evidence

[25] Mr Manase confirmed that he received the docket entailing the case against the plaintiff on 06 June 2019. It contained, among others, the statement of the complainant dated 02 June 2019; the statement of the of Ms S[...] dated 05 June 2019, a further statement deposed to by the complainant on 05 June 2019, and Capt. Maliwa's arresting statement. These are the same statements he relied on in deciding to prosecute the plaintiff. Below I set out in summary the material contents of these statements.

(a) The statement of the complainant dated 02 June 2019

[26] In this statement, the complainant states that as he was sleeping in another room, he heard his children screaming calling for him. He went at once to investigate. His daughter, Y[...] S[...], told him that certain people entered the house and when she raised her head from the couch where she had been sleeping, one suspect pushed her head against the couch and ordered her not to. In that moment, another suspect took the television set and two cell phones. She managed to see two of the suspects and could not establish if there were others as she was in a state of shock.

(b) The statement of Y[...] S[...] dated 05 June 2019

[27] In her statement, Ms S[...] states that she was asleep at her home when she saw two unknown black males. One of them took the television off its stand. The lights were on, and she pretended to be asleep. The two males also took two cell phones. She could see that it was 'Siphe' and 'Sikhusele'. She saw their faces and

their attire. Siphe was wearing a ‘lemon’ overall and Sikhusele was wearing a big navy jacket. She knew both males from her locality.

(c) The statement of the complaint dated 05 June 2019.

[28] In this additional statement, the complainant states that he was asleep when the breaking in took place on 01 June 2019 around midnight. He did not see the suspects, but Ms S[...] did. She was crying and very scared on the night of the breaking-in. She told him the names the suspects the next day.

(d) The arrest statement of Capt. Maliwa

[29] In his statement detailing the circumstances of the plaintiff’s arrest, Capt. Maliwa states that on Tuesday 04 June 2019 at 22h00 he was attending to the investigation of the complaint made by the complainant, the complainant pointed out two males whom he said were the culprits of the breaking in at his house. The complainant pointed out persons known as Siphe Caza and Sikhusele Mlisa, and he arrested both males and searched their houses but found nothing that belonged to the complainant. The two males denied allegations against them.

[30] Explaining the basis of his decision to prosecute the plaintiff, Mr Manase went on to state that he considered all these statements conjunctively. It is only where there is acceptable evidence linking the plaintiff to the alleged crimes that he would enrol the case. Upon reading the above-mentioned statements, he formed a view that there was admissible evidence and a prima facie case against the plaintiff.

[31] In regard to the identification of the suspects by Ms S[...], Mr Manase considered the fact that this witness had prior knowledge of the suspects. He was satisfied with the identity of the suspects. Hence, he enrolled the case against the plaintiff. When pressed in cross-examination regarding the cogency of Ms S[...]’s

evidence of the identification the suspects of the alleged crimes, he conceded that Ms S[...]’s statement did not clearly identify the plaintiff as the suspect. In similar vein, Mr Manase testified that Ms S[...]’s statement was sufficiently clear for him to enrol the case against the plaintiff.

[32] I asked Mr Manase questions to elucidate the facts regarding his role in the further conduct of the matter after he received the docket from Capt. Maliwa and whether he ever gave instructions to the investigator to conduct further investigations of the matter. He testified that he was unable to say whether he ever gave those instructions.

The parties’ submissions

[33] Mr *Sintwa* submitted, chiefly, that the first defendant did not pertinently plead any of the recognized grounds for justifying arrest and detention without a warrant under section 40. He took the view that even if it were to be said that in arresting the plaintiff Capt. Maliwa relied on the presence of a reasonable suspicion that the plaintiff had committed a Schedule 1 offence, that ground of justification would not be availing. On this score Mr *Sintwa* emphasized Capt. Maliwa failed to verify the information given to him by the complainant in circumstances where the complainant never witnessed the commission of the alleged offences, but his daughter did. Further according to Mr *Sintwa*, Capt. Maliwa failed to provide justification for the plaintiff’s detention, and for this reason, he wrongfully detained him. He further submitted that the first defendant was liable for the plaintiff’s further detention after his first appearance in that but for his unlawful arrest, the plaintiff would not have been detained until 26 June 2019.

[34] It was Mr *Sintwa*'s submission further that Capt. Maliwa's opposition of bail on the plaintiff's first appearance in court and his failure to timeously submit the plaintiff's profile for consideration by the prosecutor, as well as his failure to submit the complainant's withdrawal statement on 12 June 2019, was wrongful conduct which factually and legally caused the plaintiff's continued detention after his first appearance in court.

[35] As regards the claim for malicious prosecution, Mr *Sintwa* submitted that when regard is had to the statements that were at the disposal of the prosecutor when the plaintiff's case was enrolled on 06 June 2019, taken cumulatively, it cannot be said that there was reasonable and probable cause to prosecute the plaintiff. Therefore, his prosecution was malicious.

[36] Mr *Gumede* was constrained to concede that the first defendant failed to justify the plaintiff's arrest and detention both in its plea and in evidence. He further conceded that the defendant has failed to put forward a cogent defence regarding the plaintiff's continued detention after his first appearance in court. Regarding the claim from malicious prosecution, Mr *Gumede* acknowledged that the second defendant's evidence in rebuttal of the plaintiff's claim was not convincing. Even though the second defendant had initially denied that the prosecution failed, Mr *Gumede* conceded that it did when the charges against the plaintiff were withdrawn.

The legal principles

[37] Owing to the drastic nature of an arrest as a way of bringing the suspect of crime to justice, the law permits a person's arrest in circumscribed instances whether the arrest is with or without a warrant. A person may only be arrested and

detained without a warrant authorizing his arrest on any of the grounds listed in section 40(1) of the CPA.

[38] Malicious prosecution consists in the wrongful and intentional assault on the dignity of a person comprehending also his or her good name and privacy.¹ In order to succeed in his claim based on malicious prosecution, the plaintiff must allege and prove that (a) the defendants set the law in motion (instigated or instituted the proceedings); (b) the defendants acted without reasonable and probable cause; (c) the defendants acted with ‘malice’ (or *animo injuriandi*); and (d) that the prosecution has failed.² In the discussion that follows, I deal with the issues before me against the background of these legal principles.

Discussion

[39] It is significant to note that Capt. Maliwa arrested the plaintiff based on the complainant’s say-so and his pointing out of the plaintiff as the suspect. The search in the plaintiff’s room followed the arrest. During the search, he did not find any item of property that was stolen from the complainant. As mentioned, an arrest without a warrant may be made in terms of any of the seventeen grounds listed in section 40(1) of the CPA. The first defendant’s defence to the plaintiff’s claim for arrest and detention falls foul of Uniform Rule 18(4) for failure to plead the relevant facts envisaged in the relevant portion of section 40 as would have formed the basis of the plaintiff’s arrest and detention without a warrant on 04 June 2019.

[40] However, even on a benevolent reading of the first defendant’s inept plea as being that the plaintiff was suspected of being the person who committed the crimes he was arrested for, the law requires that the suspicion that a person

¹ *Relyant Trading (Pty) Ltd. v Shongwe and Another* (472/05) [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) (26 September 2006), para 5 (*Relyant*).

² *Minister for Justice & Constitutional Development v Moleko* 2009(2) SACR 585 (SCA), para 8 (*Moleko*).

committed an offence be based on reasonable grounds and the offence in question must be that which is listed in Schedule 1 of the CPA. Schedule 1 of the CPA contains a list of more serious offences. Housebreaking with intent to commit an offence and robbery are among those offences. Section 40(1)(b) of the CPA is the provision of the law in terms of which a warrantless arrest may be made by a peace officer who entertains a suspicion based on reasonable grounds that the person to be arrested committed an offence listed in Schedule 1 of the CPA.³

[41] The test for the reasonableness of the suspicion on the basis of which a person is arrested without a warrant was enunciated in *Mabona and Another v Minister of Law and Order and Others*,⁴ where the court stated:

‘[T]he reasonable man will therefore analyze and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’ (My emphasis.)

[42] Equally significant is the fact that the complainant was not the one who witnessed the commission of the offences. In the normal course of crime prevention and investigation, there would indeed be no bar in Capt. Maliwa receiving the hearsay information of the complainant which was recorded in the complainant’s statement dated 02 June 2019. However, two fundamental issues arise from his decision to solely act upon that hearsay information and the complainant’s pointing out. I deal with those issues below.

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H.

⁴ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658G-H.

[43] Firstly, from the description of the suspects given by the complainant in his statement dated 02 June 2019, there is no specific identification of the plaintiff as the suspect, either by the complainant's daughter or the complainant himself. The only time when the complainant provided the names of the suspects as allegedly furnished to him by his daughter was on 04 June 2019 via a telephone call to Capt. Maliwa. Even this information was still hearsay in nature. This is compounded by the absence of an official record of the telephone conversation between Capt. Maliwa and the complainant in which this further information was given to him.

[44] Although Capt. Maliwa had an opportunity to verify the information provided to him by interviewing the complainant's daughter when he went to the complainant's home, he did not do so. His excuse was that he was loath to wake the complainant's daughter up as she was a school going child. This, in circumstances where the identity of the suspects was evidently at the centre of his interaction with the complainant who did not witness the commission of the offence.

[45] Secondly, after Capt. Maliwa searched the plaintiff's house following his arrest, he found no stolen property that would supposedly link him to the commission of the offences. It must be accepted that apart the complainant's say-so and pointing out of the plaintiff as a suspect of the crimes, at that point, there was no objective evidence indicating that the plaintiff had committed the offences of housebreaking with intent to commit a crime, and robbery. Heedless of this important fact, Capt. Maliwa subsequently detained the plaintiff.

[46] In as much as Capt. Maliwa was not required to have certainty that the plaintiff had committed the crimes, but a suspicion, it seems to me that he acted precipitately without any solid grounds on which to arrest the plaintiff. For if, as mentioned, the complainant did not witness the commission of the offences, it was

necessary for Capt. Maliwa to verify the information pertaining to the identity of the suspects with the eyewitness to the crimes who was available when he went to the complainant's home on 04 June 2019.

[47] Even had Capt. Maliwa been lawfully authorized to arrest the plaintiff, he was obliged to apply his or her mind to the circumstances relating to his detention and this includes applying his or her mind to the question whether detention was at all necessary.⁵ For it does not automatically follow that if the arrest is lawful the detention will also be lawful.

[48] Capt. Maliwa arrested and detained the plaintiff on the kind of flighty or arbitrary grounds or suspicion that Jones J spoke about in the above quoted dictum in *Mabona*.⁶ I make the finding that the plaintiff's arrest and detention 04 June 2019 had no justification in law.

[49] Since the plaintiff holds the first defendant liable for the damages resulting from his continued detention after his first appearance in court until 26 June 2019, I must determine whether there is any basis for fixing liability for the plaintiff's further detention from 06 June 2019 on the first defendant, an issue to which I turn next.

The post-court appearance detention

[50] In resisting the plaintiff's claim for his detention after his first appearance in court, the defendant alleged in its plea, that, 'the plaintiff was detained because of his unlawful actions.' Further, that, 'he was charged with serious offences,' and that 'the members of the defendant had to act within the premises of the law.'

⁵ *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) at 90A; *Hofmeyer v Minister of Justice and Another* 1992 (3) SA 108 (C); *Minister of Police v Foutie and Another* (CA59/2020) [2021] ZAECHGHC 26 (9 March 2021) para 37.

⁶ *Supra*, footnote 4.

[51] There is indeed no automatic liability against the first defendant for a person's continued detention after appearance in court. The authority of the police to detain the suspect after arrest endures until his first appearance in court, whereafter his further detention is dependent on the decision made by the court in the exercise of its discretion.⁷ The police will be liable for the plaintiff's detention post-court appearance if by their culpable conduct they caused the harm that resulted from the further detention.⁸

[52] Once again, it is not readily discernible from the defence advanced by the first defendant in its plea whether liability for the plaintiff's detention after his first court appearance is sought to be imputed to another party and who that party is. Be that as it may, further facts emerged from Capt. Maliwa's testimony pertaining to his reasons for seeking the postponement of the plaintiff's case on 06 June 2019. Even though such facts were not pertinently raised in the pleadings, a fact which Mr *Gumede* acknowledged, both parties sufficiently ventilated them during trial. None of them have been prejudiced.⁹

[53] A legal duty rests on the arresting police officer to inform the public prosecutor of the existence of information which would justify the further detention. Similarly, where there are no facts which justify the further detention of a person, this should be communicated to the prosecutor seized with the case. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision

⁷ *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA), para 38 (*Tyokwana*).

⁸ *De Klerk v Minister of Police* (CCT 95/18) [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) (22 August 2019), para 63.

⁹ *Minister of Safety and Security v Slabbert* (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009), para 12.

whether or not there is any legal justification for the further detention of the person.¹⁰

[54] The postponement of the plaintiff's case on 06 June 2019 at the instance of Capt. Maliwa was sought in circumstances where Capt. Maliwa had found no objective evidence connecting the plaintiff to the commission of the offences. This fact was crucial in the determination of the plaintiff's eligibility to be released on bail on his first appearance in court. This is a fundamental deficiency in the case of the state which Capt. Maliwa ought to have brought to the attention of the prosecutor for the purpose of bail consideration. Capt. Maliwa's assertion that he had no obligation to convey his views on the release of the plaintiff on bail cannot be sustained.

[55] Not only that, but, perhaps astoundingly, even though a statement by the complainant withdrawing the charges against the plaintiff was made before Capt. Maliwa on 12 June 2019, he never brought it to the attention of the prosecutor on that same day. If this is not obstructive conduct on the part of Capt. Maliwa, I do not know what is. His explanation that he only became aware of the statement after his departure in November 2019 is artificial when regard is had to the fact the withdrawal statement was made before him.

[56] Furthermore, it is not without significance that on his own admission, Capt. Maliwa failed to submit the plaintiff's profile to the prosecutor before the remand date of 26 June 2019 although the profile was made available to him within the seven-day-postponement, i.e. between 06 and 12 June 2019. Unsurprisingly, on 26 June 2019, Mr Manase who was the prosecutor seized with the matter in court did not object to the plaintiff's release on bail. Had Capt. Maliwa brought the

¹⁰ *Botha v Minister of Safety and Security and Others, January v Minister of Safety Security and Others* (575/2009; 576/2009) [2011] ZACPEHC 12 (2 April 2011), para 30.

plaintiff's profile to the attention of the prosecutor as soon as he received it in the period between 06 and 12 June 2019, it is doubtful that the prosecutor's decision not to oppose bail on 26 June 2019 would have been different on an earlier date. Even if I am wrong in making this assertion, it has not been said in these proceedings that on 26 January 2019 there was further evidence in the docket which linked the plaintiff to the commission of the offences apart from the two statements of the complainant; Ms S[...]’s statement, and the arresting officer’s statement that were in the prosecutor’s possession on the plaintiff’s first appearance in court.

[57] For all the foregoing reasons I come to the conclusion that Capt. Maliwa acted culpably when he sought the postponement of the plaintiff’s case in the circumstances I have set out above. He acted culpably when he failed to advise the prosecutor on 12 June 2019 that the complainant had filed a statement withdrawing the charges against the plaintiff, and when he failed to submit to the prosecutor the plaintiff’s profile between 06 and 12 June 2019 and give insight into his eligibility to be released on bail.

[58] Capt. Maliwa’s culpable conduct is closely connected to the harm that the plaintiff suffered as a result of his detention until 26 June 2019. Therefore, the first defendant is liable for the plaintiff’s damages resulting from his detention after his court appearance until 26 June 2019. Mr *Gumede*’s concessions regarding the first respondent’s liability for the plaintiff’s arrest and detention before and after his court appearance were well made. I turn to deal with the plaintiff’s claim for malicious prosecution.

The claim for malicious prosecution

[59] At the inception stage of the prosecution, evidence that would link the plaintiff to the commission of house breaking with intent to commit a crime, apart from the evidence of his identification as a suspect, which I will deal with shortly, would include the discovery of the stolen items from him. To substantiate the allegation of robbery, the state required acceptable evidence that: (a) the complainant's items were taken from his possession (b) by use of force. In this sense, that force would have been used to subdue the person who had the custody of the property at the time of the robbery.

[60] As held in *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*,¹¹ a prosecutor need not have evidence establishing a prima facie case or proof beyond reasonable doubt when deciding to prosecute and accused. Suspicion of guilt on reasonable grounds would suffice. The fundamental question is what a reasonable prosecutor would have done considering the information available at the relevant stage.¹²

[61] It is to be accepted that where the evidence contained in the docket is unclear, the prosecution is at liberty to seek further clarity from the investigating officer and to issue instructions for further investigation as would meet the exigencies of the case. I am willing to accept that the statements of the complainant, the arresting officer and Ms S[...], individually read, contain the certain of elements of offences of house breaking with intent to commit an offence and robbery. However, witness statements are not read individually for the

¹¹ *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu* (194/2023) [2024] ZASCA 85; 2024 (2) SACR 331 (SCA) (3 June 2024).

¹² *Id.*, para 21.

purposes of making a decision whether to enrol the case against the accused. This much was confirmed by Mr Manase.

[62] The difficulty I have with the statements of the complainant and his daughter is that in regard to the offence of robbery, when they are read cumulatively, they provide no correlation regarding the crucial element of the use of force during the robbery. In his statement, the complainant alleged that his daughter explained to him that when the suspects took the television set and the two cell phones, one of them had pushed her head against the couch and ordered her not to lift it up again. Ms S[...] does not make mention of this aspect in her statement. Instead, she gives the impression that the suspects entered the house and removed the items without having any interaction with her, save for the fact that she was pretending to be asleep all that time while in truth ‘she saw who they were.’

[63] The absence of the crucial element of force from the statement of Ms S[...], the supposed eyewitness to the crimes, ought to have brought about some doubt in the mind of the prosecutor as to the reasonableness of any suspicion that there was a robbery. This lacuna and the admittedly vague identification of the suspect of the crimes is not cured by the arrestor’s statement of Capt. Maliwa who, as mentioned, never verified the information he was given by the complainant as to the identity of the suspects.

[64] It is difficult to comprehend how Mr Manase was satisfied that the plaintiff was one of the persons whom Ms S[...] mentioned in her statement. His concession that Ms S[...]’s statement did not clearly identify the plaintiff as the suspect is telling. Even though Capt. Maliwa states in his statement that the suspects “were known as Sphe Caza and Sikhusele Mlisa”, the suspect’s last names do not appear from any of the statements that he obtained from Ms S[...] and the complainant. The fact that the complainant went to point out the plaintiff as the suspect does not

cure this deficiency since the complainant did not witness the offences and there was no consultation with Ms S[...] to verify the suspects' identity.

[65] In *Prinsloo and Another v Newman*,¹³ it was held that the test for reasonable and probable cause is an objective one. It is not based on the subjective beliefs or motives of the prosecutor. Reasonable and probable cause exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time.

[66] It must also have been evident to Mr Manase from the arresting officer's statement that the plaintiff was not found with any property that was stolen from the complainant. This, coupled to the vague identification of the plaintiff as the suspect required of Mr Manase to satisfy himself that the person that Capt. Maliwa arrested to begin with, was the person who committed the offences and whom he should prosecute. At best for him, he could have done so done by means of further statements being obtained from the complainant's daughter as the supposed eyewitness to the alleged crimes.

[67] Although at first appearance in court, the plaintiff's case was postponed for a period of seven days until 12 June 2019, Mr Manase was at pains to explain why there was no objective evidence of his instructions to the investigator that further investigation be conducted into the aspect of the identity of the plaintiff as one of the suspects at that earliest stage. Notwithstanding this, the case against the plaintiff continued until charges were withdrawn against him on 05 December 2019.

¹³ 1975 (1) SA 481 (A); see also, *Relyant Trading (Pty) Ltd v Shongwe and Another* [2006] ZASCA 162; [2007] 1 All SA 375 (SCA) paragraph 14; *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B.

[68] A conundrum emerged from the evidence adduced regarding the filing of the complainant's withdrawal statement. According to Mr Manase, he only became aware of the statement on 05 December 2019 when he requested the court to withdraw the charges against the plaintiff. In the absence of the investigation diary, this Court only has Mr Manase's say-so regarding when he became aware of the complainant's withdrawal statement dated 12 June 2019.

[69] With that said, the mystery surrounding the filing of the withdrawal statement dated 12 June 2019 does not constitute a supervening fact in the further conduct of the prosecution by Mr Manase after he enrolled the case on 06 June 2019. From the inception of the prosecution, Mr Manase knew that the identity of the plaintiff as the culprit was vague. He also knew that no items of stolen property belonging to the complainant were found in possession of the plaintiff.

[70] In as much as Mr Manase did not require proof beyond reasonable doubt that the plaintiff was guilty of the alleged crimes at the time he enrolled the case, on his own showing, it was on 26 June 2019 that he requested the postponement of the matter for further investigation for the first time. The last postponement for the same reason was until 19 November 2019.

[71] Disconcertingly, Mr Manase could not confirm whether he ever issued any instructions to the investigating officer to undertake further investigation of the obscure identity of the plaintiff and other aspects of the case for the entire period from 06 June to 19 November 2019. If Mr Manase did issue such instructions, he would have no difficulty saying so despite the absence of the investigation diary. An irresistible finding is that he did not. This finding is fortified by the testimony of Capt. Maliwa that the only instruction that was issued to him by the prosecutor was in relation to the submission of the plaintiff's criminal profile.

[72] The plaintiff is required prove that the prosecutor acted with animus *animus iniuriandi*, in the sense that he/she had and intention to injure him, negligence or even gross negligence is insufficient. As explained in *Tyokwana*,¹⁴ animus iniuriandi means that the defendant, while being aware of the absence of reasonable grounds for the prosecution, directs his or her will to prosecuting the plaintiff. Consciousness of wrongfulness will be proven if the defendant did not honestly believe that the plaintiff is guilty or that reasonable grounds exist for the prosecution.¹⁵ *Dolus eventualis* will suffice.¹⁶

[73] Mr Manase failed to issue instructions to the investigating officer for further investigation of the case in circumstances where he acknowledged that the identification of the plaintiff from the witness statements available to him when he enrolled the case was vague. Furthermore, the statement of Capt. Maliwa indicated that no property belonging to the complainant was found in possession of the plaintiff which linked him to the commission of the offences.

[74] When regard is had to the information that the Mr Manase had at his disposal, it cannot be said that he honestly believed that the plaintiff was guilty of any of the offence he was alleged to have committed; or that there were reasonable grounds for the prosecution. He acted animus iniuriandi in continuing with the plaintiff's prosecution until 05 December 2019. The plaintiff's claim for malicious prosecution must succeed. What remains is the question of the quantum of damages.

The quantum of damages

¹⁴ *Tyokwana*, footnote 7 supra, para 15.

¹⁵ *Ibid* para 15.

¹⁶ *Moleko*, para 64.

[75] Damages are awarded as a gesture of goodwill to the aggrieved and they do not rectify the wrong that took place.¹⁷ They are not a means to enrich the aggrieved party.¹⁸ It is also their purpose to deter and prevent future infringements of fundamental rights by organs of state.¹⁹ There is no mechanical way of determining with precision what a fair amount of compensation would be in a given case. Regard must be had to a number of indeterminable and incommensurable factors, presented by way of evidence. Those factors include the duration of the detention, the circumstances under which the arrest and detention occurred; the presence or absence of improper motive or malice on the part of the defendant; the conduct of the defendant; the nature of the deprivation; the status and standing of the plaintiff.’²⁰

[76] While it is always helpful to have regard to previous awards, as held in *Minister of Safety and Security v Tyulu*²¹ they are not meant to be a benchmark of the amount of damages to be awarded in a given case, otherwise, the court’s discretion in determining an appropriate award of damages would be impermissibly fettered.²² The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.

[77] Mr *Sintwa* submitted that an amount of R500 000.00 would be fair compensation for the injury suffered by the plaintiff as a result of his unlawful arrest and detention for 22 days. He further submitted that R600 000.00 was reasonable compensation for the harm caused to plaintiff when he was maliciously

¹⁷ Ibid para 50.

¹⁸ *Spannenberg and Another v Minister of Police*¹⁸ (2993/2019) [2022] ZANWHC 4 (24 February 2022) para 20.

¹⁹ *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

²⁰ *Motladile v Minister of Police* (414/2022) [2023] ZASCA 94; 2023 (2) SACR 274 (SCA) (12 June 2023), para 17.

²¹ 2009 (5) SA 85 (SCA).

²² *Spannenberg and Another v Minister of Police*²² (2993/2019) [2022] ZANWHC 4 (24 February 2022) para 20.

prosecuted. Mr *Gumede* asked the court to exercise its discretion in the determination of an award of damages.

[78] In *Minister of Police v Sabisa and Another*,²³ where the plaintiffs were detained for eight days, the Court on appeal by the Minister confirmed the court a quo's award of R400 000.00. In *Minister of Police v Mjali and Others*²⁴ the Full Court of this Division awarded R100 000.00 for arrest and detention a period of two days. In *Mtola v Minister of Police*²⁵, the plaintiff was awarded R125 000.00 on appeal for his unlawful detention for 5 days. In *Nyanya v Minister of Police*²⁶, the plaintiff was awarded R160 000.00 for detention for three and a half days. In *Diljan v Minister of Police*²⁷, on appeal, the Plaintiff was awarded R120 000.00 for a period of 3 days' detention. In *Motladile v Minister of Police*²⁸, an award by the court a quo of R60 00.00 for detention for four nights was increased on appeal to R200 000.00.

[79] It is by now trite that even though the court determines an appropriate amount of damages as a matter of discretion having to regard to various factors and what is fair between the parties, the plaintiff is not absolved of adducing evidence which will enable a court to make an appropriate and fair award.²⁹ Mr *Sintwa* readily conceded that besides the averments that the plaintiff made in support of his claim for unlawful arrest and detention, he did not adduce evidence of the conditions in which he was detained. I emphasize that the plaintiff's particulars of

²³ *Minister of Police v Sabisa and Another* (725/2023) [2024] ZASCA 105; 2024 (2) SACR 553 (SCA) (28 June 2024)

²⁴ *Minister of Police v Mjali and Others* (CA 91/2022) [2023] ZAECMH 62 (7 November 2023).

²⁵ *Mtola v Minister of Police*²⁵ (CA 23/2016) [2017] ZAECMH 56 (29 June 2017).

²⁶ *Nyanya v Minister of Police* (3577/2013) [2019] ZAECGHC 136; 2020 (2) SACR 550 (ECG (12 December 2019)).

²⁷ *Diljan v Minister of Police* (746/2021) [2022] ZASCA 103 (24 June 2022).

²⁸ *Supra*, footnote 20.

²⁹ *Rahim v The Minister of Home Affairs* (965/2013) [2015] ZASCA 92; 2015 (4) SA 433 (SCA); [2015] 3 All SA 425 (SCA) (29 May 2015), para 27.

claim were intended to delineate the issues between the parties; to enable the parties to determine the nature and extent of evidence they would need to present in support of their claim or defence, as the case may be. They served to pave the way for the evidence that each party would lead to establish the facts pleaded. They could not therefore, substitute evidence.

[80] With that said, the unlawful deprivation of a person's liberty is, in itself, a serious injury which constitutes an impermissible infringement of his/her constitutional rights to freedom and security of the person, and to human dignity. Therefore, notwithstanding the plaintiff's failure to give evidence of the conditions of his detention for the period of 22 days, he must still be compensated fairly for the damages he suffered.

[81] The conduct of Capt. Maliwa in arresting and causing the detention of the plaintiff until 26 June 2019 in the already mentioned circumstances, is an aggravating factor. Mr *Gumede* did not indicate that the amount suggested by Mr *Sintwa* as damages for the plaintiff's detention for 22 is unreasonable.

[82] Malicious prosecution infringes a person's right to reputation. The amount to be awarded for general damages in a claim for malicious prosecution is at the discretion of the court. As held in *Nakana v Claassens and Others*,³⁰ the factors that a court must consider in awarding general damages in a claim for malicious prosecution include the gravity of the charges; the nature of the prosecution; the length of time the individual was subjected to the prosecution, absence of reasonable and probable cause in setting the law in motion; the presence of improper motive or malice in initiating or instigating the prosecution; the deprivation of liberty; the status, age, and health of the plaintiff; the publicity given

³⁰ *Nakana v Claassens and Others* (137/2024) [2025] ZASCA 52 (7 May 2025) (*Nakana*).

to the criminal proceedings and the absence of a reasonable explanation or apology by the defendant. This is not a closed list.³¹

[83] Apart from the facts that he pleaded in support of his claim for malicious prosecution, the plaintiff adduced no evidence detailing how his malicious prosecution affected him. He only mentioned that at the time of giving evidence in the present matter, he was doing odd jobs in Durban, KwaZulu-Natal. In the absence of facts from which the court would assess how the plaintiff was affected by his malicious prosecution from 06 June to 05 December 2019, the amount suggested by Mr *Sintwa* is excessive. That being said, the conduct of the public prosecutor in prosecuting the plaintiff serves to aggravate the defendant's position. The plaintiff was subjected to the proceedings from 06 June to 05 December 2019 in circumstances where no reasonable and probable cause for the prosecution existed.

[84] In *Nakana*, an award of R250 000.00 for malicious prosecution was decreased on appeal to R80 000.00. In that case, the third respondent in whose favour the award was made in the court a quo was prosecuted from July 2015 until January 2016 when charges were withdrawn by the prosecutor. The third respondent who was 60 years old at the time of his prosecution conducted a conservation business on a farm. The only evidence that was adduced by the plaintiff in the present case was regarding his current employment as a casual worker in Durban.

[85] It is a trite principle of the law that the Court's evaluation of an appropriate award must take into account the current day value of the currency and not its value at the earlier time. For the purposes of the instant case an award that I

³¹ Id, para 22.

consider appropriate must be in terms of the value of currency in 2026 being the time of assessment of the plaintiff's damages. I make the finding that the amount of R500 000.00 is reasonable compensation for the harm suffered by the plaintiff resulting from his unlawful arrest on 04 June 2019 and detention until 26 June 2019. The amount of R60 000.00 is an appropriate amount of compensation for the plaintiff's damages resulting from his malicious prosecution.

Costs

[86] The general rule is that costs follow the result, unless there are exceptional circumstances which warrant a departure from this rule. One of those exceptions is where a party fails to follow a particular procedure which, if followed, would curtail the proceedings.³² The first defendant's plea to the plaintiff's claim for unlawful arrest and detention ought to have been excepted to on the relevant grounds set out in Uniform Rule 23. This was not done. Be that as it may, the conduct of the first defendant in persisting with that kind of a plea only for its counsel to make concessions towards the end of the trial is egregious and inimical to the requirement of expeditious disposal of litigation. For this reason, despite the plaintiff's own unconscionable conduct in failing to except to the first defendant's plea, it would not be just to deprive him of his costs.

[87] None of Counsel addressed me on the scale at which costs must be recoverable. The default position as set forth in Uniform Rule 67A is that costs are awarded on scale A unless there is justification for the application of a higher scale, such as the unusual complexity of the case. The present case is not unusually complex and there is no justification for awarding costs on a higher scale.

Order

³² *Scheepers and Nolte v Pate* 1909 TS 353 at 356, referred to in Van Loggenberg - Erasmus Superior Court Practice, Volume 2 [Service 13, 2020] D5-14.

[88] In the result, the following order shall issue:

1. The first defendant is held liable for the plaintiff's damages resulting from his arrest on 06 June 2019 and detention until 26 June 2019.
2. The first defendant shall pay to the plaintiff the amount of R500 000.00 as compensation for the damages he suffered resulting from his unlawful arrest and detention mentioned in (1) above.
3. The second defendant is held liable for the plaintiff's damages resulting from his malicious prosecution in the Mt Frere Magistrates' Court from 06 June 2019 until 05 December 2019.
4. The second defendant shall pay to the plaintiff the amount of R60 000.00 as compensation for the harm he suffered as a result of his malicious prosecution.
5. The aforementioned awards shall attract interest at the prescribed legal rate calculated from the date of this judgment to date of payment.
6. The first and second defendants shall pay the plaintiff's costs on scale A referred to in Uniform Rule 67A, jointly and severally, the one paying the other to be absolved.

L RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff : *Adv S Sintwa*

Instructed by : Ntshinga Attorneys Inc., Mthatha

For the 1st and 2nd defendants : *Adv N Gumede*

Instructed by : The Office of the State Attorney, Mthatha

Dates heard : 21, 22 & 24 October 2025

Date delivered: 17 February 2026